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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1903

WM. ROBERT WHITTAKER,

Petitioner,

v.

WHITTAKER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Corporation's motion to eliminate the portion of the judgment assessing costs and to require the parties to bear their own costs was a Rule 59(e) motion, which extended its time to file a notice of appeal?

2. Whether the Ninth Circuit's determination that an insider who enjoys the "actual rewards of ownership" for securities of which he is not the record owner is subject to Section 16(b) liability for short-swing trades of those securities requires review by this Court?

3. Whether the Ninth Circuit's determination that the limitations period of Section 16(b) is tolled by an insider's failure to file the trading information required by Section 16(a), the first court of appeals decision on this point, requires review by this Court?

4. Whether the decision of the Ninth Circuit to apply the *Smolowe* rule of profit calculation, in accord with essentially all other decisions considering this question, requires review by this Court?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Whittaker Corporation (hereinafter the "Corporation") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 639 F.2d 516. The unpublished opinion of the district court is reprinted at [1977-78 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 96,008.

STATEMENT OF THE CASE

The Respondent respectfully submits that the portion of Petitioner's Statement Of The Case dealing with the post-judgment jurisdictional facts is unfair in its argumentative and partial description of events. Both courts below properly determined that the Corporation filed its notice of appeal in a timely manner under Fed.R.App.P. 4(a). This was because the thirty-day period for filing the notice of appeal was extended until after the district court denied the Corporation's motion to amend the judgment. *See*, Fed.R.Civ.P. 59(e) and Fed.R.App.P. 4(a). The jurisdictional facts are clearly set out in the opinion of the court of appeals. Petition App. at A-4-5, 639 F.2d 516, 518-9.

Although the Respondent does not have any substantial criticism of the portion of the Statement of the Case presented by Petitioner which relates to the merits of the decisions below, it is respectfully submitted that a more objective and terse statement of the essential facts of the case is contained in the findings of fact by the district court. Petition App. at B-2—B-6.

REASONS FOR DENYING THE WRIT

1. Jurisdiction

The Ninth Circuit had jurisdiction to rule on the Corporation's appeal, since the time to file its notice of appeal was extended automatically by its post-judgment motion to alter the judgment so that all parties "bear their own taxable costs pending appeal". The district court and Ninth Circuit both properly recognized that the Corporation's post-trial motion could be categorized only as a Rule 59(e) motion, since the motion sought to alter the judgment to eliminate any award of costs on the grounds that the Corporation, and not Mr. Whittaker, was the prevailing party. Contrary to the assertion of the Petitioner, the decisions of the trial court and Ninth Circuit on the timeliness of the appeal were consistent with all reported decisions of this Court and the circuit courts.

2. The Ninth Circuit's Application of Section 16(b) is Entirely Consistent With All Applicable Authority.

The court of appeals in this case ruled that: (i) an insider who himself actually realized profit from trading in securities beneficially owned by him is subject to liability under Section 16(b) of the Securities Exchange Act of 1934 ("Section 16(b)") for short-swing trades involving those securities; (ii) when that insider fails to report his beneficial ownership of those securities as required by Section 16(a) of the Securities Exchange Act of 1934 ("Section 16(a)") the two-year limitations period on actions to recover those short-swing profits is tolled until such disclosure is made and (iii) the profits made on such short-swing trades are to be calculated by matching the lowest purchase price and highest sales price within a given six-month period according to the rule established in *Smolowe v. Delendo.* Every facet of this decision is consistent with applicable federal authority and in furtherance of both the legislative purpose and the literal language of Section 16(b).[1]

I

THE CORPORATION'S NOTICE OF APPEAL WAS TIMELY, BECAUSE THE FULL TIME FOR APPEAL DID NOT BEGIN TO RUN UNTIL DENIAL OF ITS MOTION TO ALTER AND AMEND THE JUDGMENT AS TO COSTS.

The judgment of the district court was entered on April 7, 1977. The judgment included an award of costs to Mr. Whittaker as the prevailing party. On April 14, 1977, within 10 days of the entry of judgment as required by Rule 59(e),

[1] Petitioner strains to create the impression that the Ninth Circuit's decision in this case "unduly expands" the scope of Section 16(b) in contravention of the statute's literal terms, when in fact it merely confirms that Section 16 is effectual in curbing insider short-swing trading such as that engaged in by Mr. Whittaker in this case.

Fed.R.Civ.P., the Corporation filed a motion requesting the district court to alter and amend its judgment by vacating that portion of the judgment which provided for the award of costs to Mr. Whittaker and providing instead that the parties bear their own taxable costs. The Corporation argued that it, not Mr. Whittaker, should be considered the prevailing party because of the unusual procedural posture of the case and because the court's judgment permitted it to retain all of the short-swing profits previously paid to the Corporation by Mr. Whittaker which were not barred by the court's interpretation of the applicable statute of limitations. The motion to alter or amend the judgment, styled as a motion to "retax costs", was denied on April 20, 1977. When on May 10, 1977 the Clerk refused to accept the Corporation's notice of appeal, the notice was lodged with the Clerk and on May 11 the Corporation moved the district court for an order directing the Clerk to file the notice as timely. On May 18, 1977 the district court found that the Corporation's notice of appeal was timely and ordered the Clerk to accept it for filing as of that day. The district court specifically found that the Corporation's motion of April 14 necessarily sought an amendment of its judgment, thereby tolling the period within which the Corporation was bound to file its notice of appeal.

The Ninth Circuit and all other circuits which have considered the question have recognized that a motion to provide for or eliminate an award of costs embodied in a judgment constitutes a motion to "alter or amend" the judgment within the meaning of Fed.R.Civ.P. 59(e) and thereby terminates the running of the time to notice an appeal under Fed.R.App.P. 4(a), which time commences to run anew after the trial court rules upon the motion. Since the judgment entered by the district court actually incorporated a provision directing an award of costs to Mr. Whittaker, the Corporation clearly could not have asked the Clerk to reverse the court's judgment. The Corporation's only recourse was to ask the court to amend the

judgment, a motion authorized only under Rule 59(e). Rule 54(d), Fed.R.Civ.P., only provides for a motion to review "the action of the Clerk" in taxing costs, and clearly did not authorize the motion the Corporation had to make.

Petitioner asserts incorrectly that the Ninth Circuit's exercise of jurisdiction in this case conflicts with the decision of the Fifth Circuit Court of Appeals in *Knowles v. United States*, 260 F.2d 852 (5th Cir. 1958). In fact, the decision of the Ninth Circuit properly interpreted and distinguished the decision in the *Knowles* case. Petition App. at A-7 n.2, 639 F.2d at 521 n.2. The court of appeals focused on the procedural history of the *Knowles* case and properly recognized that it was manifestly distinguishable from the case at bar. Unlike the Corporation's motion of April 14 which sought to amend a unitary judgment to eliminate an award of costs, the appellant in *Knowles* moved to vacate a separate and subsequent order of the District Court which had not been included in the original judgment.[2]

Accordingly, unlike the motion of the Corporation in the present case which sought an amendment of a judgment that included an award of costs, the motion in the *Knowles* case sought only to vacate a separate and subsequent order awarding costs. After the motion to vacate was denied, the order providing for the award of costs became a separate and distinct

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[2] The record before the court of appeals in *Knowles* indicated that the trial court's order denying plaintiff's motions for a new trial and for additional findings and conclusions was entered on December 20, 1957. Since her notice of appeal was not filed until February 19, 1958, it was untimely under the sixty day limitation applicable to litigation in which the United States is a party. However, the court also had before it a notice of appeal from a separate order of January 28, 1958, denying plaintiff's motion to vacate an order directing the clerk to tax costs against her. The description of the procedural history by the court of appeals in *Knowles* makes it clear that there was not a judgment awarding costs prior to January 28, 1958. None of the prior trial or appellate court decisions made any mention of an award of costs. Since each of the prior decisions was rendered on the same date that the resulting judgments were entered, apparently none of the judgments contained any reference to an award of costs. See prior decisions at 144 F.Supp. 440; 235 F.2d 177; 155 F.Supp. 678; 157 F.Supp. 678.

judgment. Furthermore, the costs awarded in that separate judgment were incurred in connection with a prior appeal in the case and did not involve any of the costs incurred in the successive trials in the action. In the present litigation, the district court's judgment specifically embodied an award of costs to Mr. Whittaker as prevailing party. The award of costs became as much a part of the court's judgment as the monetary recovery on the merits. Unlike the unusual procedural posture which resulted in a separate judgment and appeal on the issue of costs in the *Knowles* case, the Ninth Circuit was presented with an indivisible judgment covering all substantive relief in the present litigation.

The circuit courts have consistently held that a motion to amend a judgment with respect to costs is a Rule 59(e) motion, which extends the party's time to appeal until after the motion is determined: *United States v. 2186.63 Acres of Land, Wasatch Co., Utah,* 464 F.2d 676, 677-678 (10th Cir. 1972) (court specifically recognizes that a motion to delete the award of costs in a judgment constitutes a motion to amend the judgment under Rule 59(e)); *United States v. Crawford,* 36 F.R.D. 1974, 1975 (W.D.L.A. 1964) (court recognizes that a motion to tax costs against a different party is a Rule 59(e) motion); *Ore Carriers of Liberia, Inc. v. Navigen Company,* 305 F.Supp. 895, 896 (S.D.N.Y. 1969), *aff'd,* 435 F.2d 549 (2nd Cir. 1970) (motion to amend judgment to award costs recognized as motion under Rule 59(e)); *Stracy v. Williams,* 446 F.2d 1366, 1367 (5th Cir. 1971) (same circuit court as decided *Knowles* case holds that motion to alter or amend judgment to provide for an award of costs must be made within ten days after entry of judgment pursuant to Rule 59(e)); *First National Bank of Greenwich v. National Airlines, Inc.,* 167 F.Supp. 167, 169 (S.D.N.Y. 1958) (where a judgment submitted by prevailing parties made no reference to assessment of costs, court could exercise its discretion to amend judgment pursuant to Rule 59(e)); *Alameda v. Paraffine Companies, Inc.,* 169 F.2d 408,

409 (9th Cir. 1948) (court holds that the amendment of a judgment to award costs triggers anew the running of the time of appeal from the judgment).[3]

Respondent fails to see see any relevance whatsoever in Petitioners citation to this Court's decision in *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952). That decision merely stands for the proposition that post-judgment motions addressed to matters beyond the scope of the issues considered by the lower court cannot extend the parties' time to file petitions for certiorari. The post-judgment motion in this case required the trial court to determine who was the prevailing party; it did not involve a matter collateral to the merits of the judgment.

In light of the consistent authorities discussed *supra* which were applied correctly by the court of appeals, Respondent fails to understand Petitioner's contention that either the case authorities or the court's application of those authorities are inconsistent with the principles previously announced by this Court.

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[3] Although the penultimate sentence in Fed.R.Civ.P. 58, which provides for the entry of judgment without waiting for taxation of costs by the clerk, was not yet effective when the *Alameda* case was decided, the addition of this language did not change the substantive effect of the court's ruling that the addition of a provision for costs to a judgment, whether or not in a liquidated amount, constitutes an amendment of the judgment. Rule 58 merely confirmed the existing case law permitting entry of judgment prior to the time the clerk performed the ministerial function of calculating costs and taxing them in accordance with the judgment. Furthermore, Petitioner's contention (Petition, p. 6, n.4) that the *Alameda* case was overrulled by the 1948 amendments to Fed.R.Civ.P. 73(a) is totally without merit. The Advisory Committee's Note, referrred to by the Petitioner, does not refer to the *Alameda* decision at all and notes that the amendment to Rule 73 allowed the sort of relief that was brought about in *Hill v. Hawes*, 320 U.S. 520 (1944), but avoided the difficulty with an indefinite lack of finality.

II

THE DECISION BELOW APPLIES THE LITERAL TERMS OF SECTION 16 IN ACCORD WITH ALL RELEVANT AUTHORITY

A. The Ninth Circuit's Determination That An Insider Who Enjoys The "Actual Rewards of Ownership" For Securities Of Which He Is Not The Record Owner Is Subject To Section 16(b) Liability For Short-Swing Trades Of Those Securities Provides Clear Guidance As To Applicable Federal Law On This Point And Does Not Require Review By This Court.

The Ninth Circuit held in this case that:

> [A]n insider who trades in shares which he or she beneficially owns within the meaning of § 16(a) may be subject to the sanctions of § 16(b). Such liability should be imposed, however, only following a determination by the trial court not simply that the requirements of beneficial ownership were met for purposes of the § 16(a) reporting requirement, but that actual rewards of ownership were sufficiently present to warrant attributing the stock to the insider for purposes of § 16(b). In making this determination, the court should especially consider as key factors the degree to which the insider exercised control over the securities and the insider's ability to use the profits made.

Whittaker v. Whittaker Corp., 639 F.2d 516, 526 (Citations omitted), Petition App. at A-18.

Petitioner asserts that this holding conflicts with principles of interpretation set forth in *Blau v. Lehman*, 368 U.S. 403 (1962), as well as subsequent cases construing Section 16(b) and other federal securities laws. Petition at p. 10. To the contrary, the holding of the Ninth Circuit is entirely consistent with *Blau v. Lehman* as well as all applicable lower court decisions.

In every federal case which has considered the issue of attribution, the lower court has made an initial factual determination as to whether the insider under scrutiny enjoys sufficient benefits from securities of which she/he is not the record owner to hold that beneficial ownership exists for purposes of Section 16(b).[4] Where such beneficial ownership was found to exist, the court went on to impose liability under Section 16(b)[5], while in those cases where there was no determination of beneficial ownership, no liability was imposed.[6] The district court in this case found that Mr. Whittaker in fact did enjoy "benefits substantially equivalent to those of ownership" and that

> [t]he power of attorney exercised by Mr. Whittaker allowed him unfettered control over his mother's affairs and under these circumstances it would be absurd for this

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[4] *See, e.g., Blau v. Lehman,* 368 U.S. 403 (1962) (trial court found that plaintiff did not prove beneficial ownership); *Whiting v. The Dow Chemical Company,* 523 F.2d 680 (2d Cir. 1975) (husband held to "beneficially own" traded securities held in wife's name); *Allis-Chalmers Mfg. Co. v. Gulf & W. Indus., Inc.,* 527 F.2d 335 (7th Cir. 1975), *cert. denied* 423 U.S. 1078 (1976) (legally significant relationship between corporations necessary before one can be deemed beneficial owner of other's securities); *Altamil Corp. v. Pryor,* 405 F. Supp. 1222 (S.D. Ind. 1975) (husband held to "beneficially own" traded securities held in wife's name); *Schur v. Salzman,* 365 F. Supp. 725 (S.D.N.Y. 1973) (absent special circumstances insider is beneficial owner of stock in spouse's or child's name); *Blau v. Potter,* 1973 CCH Fed. Sec. L. Rep. ¶94,115, 94,115 (S.D.N.Y. 1973) (plaintiff failed to prove that corporate officer was beneficial owner of shares purchased by officer's spouse); *Marquette Cement Manufacturing Co. v. Andreas,* 239 F. Supp. 962 (S.D.N.Y. 1965) (trustee found to not be beneficial owner of shares in bona fide trusts, except trust for his benefit); *Jefferson Lake Sulphur Co. v. Walet,* 104 F. Supp. 20 (E.D. La. 1952), *aff'd* 202 F.2d 433 (5th Cir. 1953) *cert. denied* 346 U.S. 820 (1953) (insider liable for all short swing profits even though securities held were community property).

[5] *See, e.g., Whiting v. The Dow Chemical Company,* 523 F.2d 680 (2d Cir. 1975).

[6] *See, e.g., Blau v. Lehman,* 368 U.S. 403 (1962).

> court to reach the conclusion that Mr. Whittaker's trading on behalf of his mother was not in fact done for his own benefit.

Whittaker v. Whittaker Corp., (C.D. Cal. 1977), Petition App. at B-12.

There has been no speculative supposition of possible eventual benefit to Mr. Whittaker, as petitioner strives to persuade the Court (Petition at p. 10), but rather an express finding of actual, direct benefit to William R. Whittaker. This imposition of liability upon a finding of direct benefit is merely the logical corollary of this Court's refusal in *Blau v. Lehman*, 368 U.S. 403 (1962) to impose liability in a case in which it would have been "nothing but a fiction to say that Thomas [the insider] 'realized' all the profits earned by the partnership of which he was a member." 368 U.S. at 414.[7]

Petitioner briefly asserts that the two most relevant lower court decisions, *Whiting v. The Dow Chemical Company*, 523 F.2d 680 (2d Cir. 1975) and *Altamil Corp. v. Pryor*, 405 F. Supp. 1222 (S.D. Ind. 1975),[8] "expanded § 16(b)'s 'extra-

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[7] Petitioner relies primarily on *Blau v. Lehman*, 368 U.S. 403 (1962) to support his argument that holding Mr. Whittaker liable for profits which he realized from himself trading in his mother's securities is an undue expansion of Section 16(b) liability. In *Blau v. Lehman* this Court did decline to impose liability on Mr. Thomas, a partner in Lehman Brothers who served as a director of Tide Water, for the entire profit made by Lehman Brothers on its transactions in the securities of Tide Water since it was found, inter alia, that Thomas had no influence over investment decisions for Lehman Brothers and that Thomas disclaimed any interest in profits realized by the partnership's trading in Tide Water securities. Contrast those facts with the facts of the present case, where it was found, inter alia, that Mr. Whittaker made all investment decisions for his mother and initiated them at his sole discretion (Petition App. at B-4, B-6) and that Mr. Whittaker stood to gain on any profits he might make for his mother through the purchase and sale of Whittaker Corporation securities (Petition App. at B-11).

[8] In *Whiting* and in *Altamil* each court engaged in a factual determination of beneficial ownership and concluded in each case that the husband must be considered the beneficial owner of his wife's shares and therefore subject to Section 16(b) liability for short-swing trades of those shares.

ordinary liability' beyond the limits fixed by Congress . . ." (Petition at p. 10) and presumably, therefore, should be disregarded. Instead of looking to relevant Section 16(b) authority, petitioner instead seeks to refer this Court to three inapposite decisions involving federal tax liability[9] in an attempt to create the impression that the Ninth Circuit decision in this case in some way conflicts with a body of federal decisional authority. By ignoring the considerable body of relevant decisions with which the Ninth Circuit is consistent, the petitioner has failed completely to demonstrate that the Ninth Circuit's decision conflicts with any applicable federal law on this point. On the contrary, all relevant federal authority with regard to Section 16(b) liability for short-swing trading in beneficially owned securities is consistent with the Ninth Circuit's decision in this case.[10] The Ninth Circuit in this case has signified that it is in accord with the Second Circuit on the issue of insider liability for trading of beneficially owned securities. These lower federal courts are in accord with the principles applied by this Court in *Blau v. Lehman* with regard to beneficial ownership, and, accordingly, the guidance of this Court is not necessary at this time.

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[9] In *Ross v. United States,* 122 F. Supp. 642 (D. Mass. 1954) the court merely concluded that capital gains proceeds were taxable to the son, not the father, when the father bought an interest in real property acting on behalf of his son, viewing the transaction as creating a resulting trust in favor of the son as a matter of state law. In *Heminway v. Commissioner,* 44 T.C. 96 (1965) the court held that a sister transferred shares to her brother subject to a retained interest in herself of the right to receive dividends, therefore those dividends were taxable to the sister, not the brother. In *Nichols v. Commissioner,* 14 BTA 1347 (1929) *mod.* 17 BTA 580 (1929) the Board held that where the entire sale proceeds were forwarded from the petitioner to his brother, and the petitioner received no commission or profit of any kind in the transaction, that the petitioner did not himself realize taxable income on that sale for his brother.

[10] See footnote 4, supra.

B. The Ninth Circuit's Determination That The Limitations Period Of Section 16(b) Is Tolled By An Insider's Failure To File The Trading Information Required By Section 16(a) Provides Clear Guidance As To Applicable Federal Law On This Point And Does Not Require Review By This Court.

The Ninth Circuit is the first court of appeals to decide the question of whether the two-year limitations period applicable to a claim against an insider under Section 16(b) for profits realized from short-swing trades in a corporation's securities is tolled until the insider publicly discloses the existence of the transactions by reporting the trades as required by Section 16(a). After consideration of the legislative history and purpose of Section 16 as a whole, revealing a strong congressional intent to curb insider trading abuses, together with the complimentary nature of Sections 16(a) and 16(b), the court of appeals reasoned that

> The disclosures and reports of § 16(a) are an integral part of the context of § 16 within which § 16(b) must be read. The short limitations period is understandable only in the context of the insider's duty to make prompt disclosure.

Whittaker v. Whittaker Corp., 639 F.2d at 528 (citations omitted), Petition App. at A-21.

Therefore, the court of appeals concluded that failure to make disclosures as required by Section 16(a) requires that the two-year limitations period of Section 16(b) be tolled in order to effectuate the salutory purpose of Section 16(b)'s remedy for the recovery of short term profits. 639 F.2d at 530, Petition App. at A-26.

In reaching its conclusion as described above, the court reviewed existing federal authority on the question. It found that three cases from the Southern District of New York agreed

with this analysis[11] while one twenty-seven-year-old case from the Middle District of Pennsylvania rejected that analysis and adopted a strict interpretation of the two-year limit.[12] The court of appeals considered *Grossman v. Young* and *Blau v. Albert*, both from the Southern District of New York, to be the better reasoned of the existing district court decisions, and made reference to them for their further elaboration of what it described as the "disclosure" scheme of Section 16. *See* 639 F.2d at 529, Petition App. at A-24. The court then reviewed the only contrary authority on point, *Carr-Consolidated Biscuit Company v. Moore*, 125 F. Supp. 423 (M.D. Pa. 1954) at some length, but noted that the court in that case strictly interpreted Section 16(b)'s two year time limitation because that court relied on the theory that substantive statutes of limitations are entitled to literal application by a court and may not be tolled, while only procedural statutes of limitation are subject to the equitable tolling doctrine. As noted by the Ninth Circuit, this theory with regard to substantive statutes of limitation was effectively renounced by this Court in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 556-59 (1974), where this Court held that the federal courts have the inherent power to toll the running of any statute of limitations, whether "substantive" or "procedural." Mr. Justice Stewart expressed the holding of the Court therein as follows:

> "[T]he fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled." 380 U.S. at 427 n.2. . . The proper test is not

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[11] *Shattuck Denn Mining Corp. v. La Morte*, 1973-1974 Transfer Binder, CCH Fed. Sec. L. Rep. ¶ 94,429 at 95,472 (S.D.N.Y. 1974); *Blau v. Albert*, 157 F. Supp. 816 (S.D.N.Y. 1957); *Grossman v. Young*, 72 F. Supp. 375 (S.D.N.Y. 1947).

[12] *Carr-Consolidated Biscuit Company v. Moore*, 125 F. Supp. 423 (M.D. Pa. 1954).

> whether a time limitation is "substantive" or "procedural," but whether tolling the limitation in a given context is consonant with the legislative scheme [footnote omitted].

American Pipe and Construction Co. v. Utah, 414 U.S. 538, 557-58.

Petitioner asserts that the tolling doctrine applied by the court of appeals is "alien" to federal procedure in general and to the federal securities laws in particular. He argues that the district court's finding that certain corporate insiders were on notice of facts sufficient to put the corporation on notice of a potential Section 16(b) claim (Petition App. at B-17)[13] renders tolling unavailable. This argument was expressly considered and rejected by the court of appeals, however, which reasoned as follows:

> Under the notice interpretation, the question arises whether the knowledge of corporate officers or directors should be attributed to the corporation, thus giving it notice and allowing the limitations period to run. Normally, knowledge of corporate officials is imputed to the corporation. But in the § 16 context, if corporate officials' knowledge of another insider's trading and indeed even the trading insider's own knowledge were imputed to the corporation, then the corporation's right to recover the profits and especially the ability of minority shareholders to bring such suits would be seriously impaired. *Cf. Schur v. Salzman,* 365 F.Supp. 725, 733 (S.D.N.Y.1973); *Jefferson Lake Sulphur Co. v. Walet,* 104 F.Supp. 20, 23 (E.D.La.1952), *aff'd,* 202 F.2d 433 (5th Cir.), *cert. denied,* 346 U.S. 820, 74 S.Ct. 35, 98 L.Ed. 346 (1953) (corporation's Section 16(b) suit not estopped on ground that corporation ap-

[13] This finding was challenged by the Corporation on appeal, but because the court of appeals considered the disclosure requirement of Section 16(a) to toll the limitation of Section 16(b) it did not reach the Corporation's claim that the district court's conclusion as to notice was clearly erroneous. 639 F.2d at 527, Petition App. at A-20.

> proved of transactions, since corporation's action under control of very insiders involved). *See also* Cook & Feldman, *supra*, 66 Harv.L.Rev. at 413-14. Collusion among insiders and, a more likely occurrence, the unarticulated acquiescence in or averting of gaze from a powerful insider's transactions thus would be rewarded under the notice interpretation. This problem does not arise under the disclosure interpretation. Thus, the disclosure interpretation adopted herein better serves the purposes of the statute.

Whittaker v. Whittaker Corp., 639 F.2d at 528-29, Petition App. at A-22—23.

There is no dilemma with regard to the applicable federal law on the question of the tolling of the two year limitations period of Section 16(b) due to the nondisclosure of relevant trading information by an insider as required under Section 16(a). The Ninth Circuit, after consideration of governing Supreme Court authority as well as pertinent federal authority from the district courts of other circuits, concluded that the legislative intent in drafting Section 16 together with the prior cases clearly indicated that the better reasoned approach is to provide for tolling. This decision of the Ninth Circuit is the only court of appeals decision on point and it is consistent with all but one of the district court opinions which have addressed this issue. There is no indication that any other federal court has been inclined to apply the *Carr-Consolidated Biscuit* decision in the almost thirty years since it was decided. Thus, the unanimous of district court opinions out of the Second Circuit and the court of appeals decision in the Ninth Circuit provide clear guidance to other federal courts that such tolling is appropriate in order to effectuate the salutory purposes of Section 16.

C. The Ninth Circuit's Adoption Of The *Smolowe* Rule Of Matching The Lowest Purchase Price And Highest Sales Price Within A Given Six-Month Period In Order To Calculate "Profit Realized" Is Consistent With the Unanimous Position Of The Other Federal Courts Which Have Considered The Question.

The instant case was the first occasion for the Ninth Circuit to consider the appropriate method of computing profit under Section 16(b), and it concluded:

> Persuaded by its merit and its long continued use in other courts, we adopt the *Smolowe* rule.
>
> Under the *Smolowe* rule, the highest sales price is matched with the lowest purchase price in any given six month period. In analyzing the legislative history and the remedial nature of the statute, the court in *Smolowe* concluded:
>
> > The statute is broadly remedial. [citation omitted] Recovery runs not to the shareholder, but to the corporation. We must suppose that the statute was intended to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty. [citations omitted] The only rule whereby all possible profits can be surely recovered is that of lowest price in, highest price out—within six months. [*Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir.) *cert. denied* 320 U.S. 751, 64 S. Ct. 56, 88 L. Ed. 446 (1943)].

Whittaker v. Whittaker Corp., 639 F.2d at 531 (footnote omitted), Petition App. at A-27.

In reaching its conclusion, the Ninth Circuit considered, and was persuaded by, the fact that the *Smolowe* rule has been almost universally applied in the thirty-eight years since its publication.[14]

The court below also addressed Petitioner's argument, which he attempts to raise again before this Court, that the Seventh Circuit disapproved the *Smolowe* rule in *Allis-Chalmers Mfg. Co. v. Gulf & W. Indus., Inc.*, 527 F.2d 335 (7th Cir. 1975) *cert. denied* 423 U.S. 1078, 96 S. Ct. 865, 47 L. Ed. 2d 89 (1976).[15] As noted by the Ninth Circuit, the Seventh Circuit in *Allis-Chalmers* in fact did not disapprove *Smolowe*, but rather

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[14] *Second Circuit: Smolowe v. Delendo Corporation*, 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751, 64 S. Ct. 56, 88 L. Ed. 446 (1943); *Gratz v. Claughton*, 187 F.2d 46, 50-52 (2d Cir.), *cert. denied*, 341 U.S. 920, 71 S. Ct. 741, 95 L. Ed. 1353 (1951) (L. Hand, J.); *Feder v. Martin Marietta Corp.*, 406 F.2d 260, 269 (2d Cir. 1969), *cert. denied*, 396 U.S. 1036, 90 S. Ct. 678, 24 L. Ed. 2d 681 (1970); *Adler v. Klawans*, 267 F.2d 840, 847-48 (2d Cir. 1959). *Cf. Cummings v. C.I.R.*, 506 F.2d 449, 452 (2d Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S. Ct. 1571, 43 L. Ed. 2d 779 (1975) (in analysis that insider's repayment of Section 16(b) profits is a long term capital loss, court uses *Smolowe* approvingly).

Southern District of New York: Lewis v. Levinson, [1978 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 96,430 (S.D.N.Y. 1978); *Makofsky v. Ultra Dynamics Corp.*, 383 F. Supp. 631, 638-39 (S.D.N.Y. 1974); *Schur v. Salzman*, 365 F. Supp. 725, 730-31 (S.D.N.Y. 1973); *Volk v. Zlotoff*, 318 F. Supp. 864, 865 (S.D.N.Y. 1970).

Other Circuits: Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736, 742-43 (8th Cir. 1965), *cert. denied*, 382 U.S. 987, 86 S. Ct. 556, 15 L. Ed. 2d 475 (1966); *Morales v. Mylan Laboratories, Inc.*, 443 F. Supp. 778, 780 (W.D.Pa. 1978); *Heli-Coil Corp. v. Webster*, 222 F. Supp. 831, 837 (D.N.J. 1963), *aff'd as modified on other grounds*, 352 F.2d 156 (3d Cir. 1965); *Arkansas Louisiana Gas Co. v. W. R. Stephens Invest. Co.*, 141 F. Supp. 841, 847 (W.D. Ark. 1956).

[15] Petitioner also attempts to propose alternate methods of profit calculation in preference to the *Smolowe* rule. (Petition at p. 17-19). This same proposal by Petitioner was considered and rejected by the Ninth Circuit as being equally artificial as *Smolowe* without the benefit of assuring full recovery of profits to the corporation. 639 F.2d at 533, Petition App. at A-31.

indeed agreed with its underlying principle. 527 F.2d at 355. What the *Allis-Chalmers* court declined to do was apply *Smolowe* outside of its trade-matching context as authority for a proposition that in valuing securities the highest possible value should be selected. *See* 527 F.2d at 354-56. The Seventh Circuit in fact has cited the *Smolowe* profit calculation rule approvingly in *Anderson v. C.I.R.*, 480 F.2d 1304, 1307 (7th Cir. 1973) and so cannot be said to be in conflict with what is now the rule in the Second,[16] Eighth,[17] and Ninth Circuits.[18]

Throughout his petition Mr. Whittaker has asked this Court to ignore the considerable body of federal authority which supports the decision of the Ninth Circuit in this case and to look instead to dictum and inapposite cases in a vain effort for an opportunity to re-open litigation of the facts of this case. There is no basis for asking this Court to review the decision of the Ninth Circuit. The court of appeals gave careful consideration to all relevant authority and issued an opinion that is entirely consistent with existing federal authority on each of the issues addressed.

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[16] *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir.) *cert. denied* 320 U.S. 751 (1943); *See also* cases cited at n.12, *supra.*

[17] *Western Auto Supply Company v. Gamble-Skogmo, Inc.*, 348 F.2d 736 (8th Cir. 1965) *cert. denied* 382 U.S. 987 (1966).

[18] *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 530-533 (9th Cir. 1981).

CONCLUSION

For these reasons the petition for a writ of certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeals should be denied.

Respectfully submitted,

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